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Nos. 13-354 & 13-356

In the Supreme Court of the United States

Kathleen Sebelius, et. al.,Petitioners
v.
Hobby Lobby Stores, Inc., et al.,
Respondents

Conestoga Wood Specialties Corp., et. al.,
Petitioners
v.
Kathleen Sebelius, et al., Respondents

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

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Brief of Liberty University and Liberty Counsel as Amici Curiae in Support of Hobby Lobby and Conestoga, et al.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

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INTEREST OF AMICI CURIAE[1]

Amicus Liberty University, Inc., represented by Amicus Liberty Counsel, filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici's challenge was the most comprehensive challenge to both the Employer and Individual mandates and other provisions in the Act that exceed Congress' enumerated powers and constitutional and statutory protections of free exercise of religion.

Because of the comprehensive scope of their challenge to the Act, Amici have developed a significant body of information on

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents Kathleen Sebelius and Conestoga Wood Specialties have filed consents to the filing of Amicus Briefs on behalf of either party or no party. Respondent Hobby Lobby has consented to the filing of this Amicus Brief and its consent is submitted simultaneously with this Brief.

the detrimental effects that various provisions in the Act have on foundational constitutional and statutory rights, particularly on free exercise rights of employers. The regulations at issue in this case exemplify the conflict between free exercise rights and government regulation.

Amici have a unique perspective on and direct stake in the outcome of this Court's determination of the question of whether the Preventive Care Mandate violates free exercise under the Religious Freedom Restoration Act (RFRA). Amici believe that the information they provide in this brief is of critical importance to this Court's resolution of the conflict between religious freedom and insurance regulation, and will aid the Court in reaching a reasoned decision.

Based upon the foregoing, Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

At issue is this case is a conflict between the fundamental right to free exercise of religion upon which this country was founded and intrusive governmental regulation. Ignoring the free exercise rights protected by the First Amendment to the United States Constitution and the re-affirmation of those rights in the Religious Freedom Restoration Act (RFRA), the

Administration has enacted regulations that compel employers to choose between their sincerely held religious beliefs and continued viability of their organizations. Employers such as Hobby Lobby, Conestoga Wood and Amicus Liberty University, which operate their businesses and organizations in accordance with religious principles that prohibit facilitating the termination of unborn life are being told by their government that they must either abandon their principles and provide free abortion-inducing drugs and devices, under the guise of women's "preventive care" to their employees or pay multi-million dollar fines and face civil liability for violation of ERISA and other federal laws.

Unlike the requirements of ERISA and other laws regulating employee benefit programs, the mandate imposed under the Patient Protection and Affordable Care Act (the "Act") does not permit employers to discontinue offering health insurance coverage and thereby avoid the mandate and the penalties. Consequently, unlike any other federal regulatory program, the Act imposes a perpetual Hobson's choice of either violating sincerely held religious beliefs or paying multi-million fines. The only escape for employers is to go out of business, thereby denying their employees not only health insurance benefits, but also their jobs. Because of the punitive nature of the fines, even employers who do not want to go out of

business will be forced out unless they compromise their religious beliefs.

Subjecting employers to such extortion is antithetical to both the First Amendment and to the free exercise protections that Congress re-affirmed in RFRA. Those protections are incorporated into the Act and therefore require that the regulations imposed by the Administration respect the religious freedoms of those subject to the comprehensive law. Congress had also previously rejected attempts to impose contraception mandates with no religious exemptions, further buttressing Congress' commitment to protecting religious freedom. The Administration exceeded its authority when it ignored Congress' direction and enacted a perpetual mandate that forces employers to either abandon religious principles or shutter their businesses.

This Court should take the opportunity afforded by this case to protect religious liberty and invalidate the Preventive Care Mandate.

ARGUMENT

I. THE PREVENTIVE CARE MANDATE TRAMPLES UPON EMPLOYERS' FREE EXERCISE RIGHTS.

When the Administration[2] enacted regulations defining "women's preventive care" to include all FDA approved "contraceptives"–including abortion inducing drugs and devices–provided at no cost to beneficiaries,[3] it placed the Act on a collision course with foundational free exercise rights. As one commentator concluded, "[e]mployers' freedom to conduct their business in harmony with their religious beliefs is trampled upon by the contraceptive mandate."[4] The freedom to conduct business in harmony with free exercise rights is embodied

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[2] Amici will use the term "the Administration" to refer to the various administrative agencies that have participated in drafting the regulations at issue in this case.

[3] Amici will refer to the regulations incorporating coverage for contraceptives and abortifacients into the definition of women's preventive care under the Act as the "Preventive Care Mandate."

[4] Emily Pitt Mattingly, *"Hobby-Lobby"-ing For Religious Freedom: Crafting The Religious Employer Exemption To The PPACA*, 102 KY. L.J. 183, 185 (2014).

not only in the First Amendment to the United States Constitution, but also in Congress' re-affirmation of the primacy of free exercise rights through enactment of the Religious Freedom Restoration Act ("RFRA"). Congress expressly enacted RFRA to diligently protect foundational free exercise rights in response to what Congress viewed as a diminution of protection in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See Gonzales v. O Centro Espírita Beneficente União do Vegetal (UDV)*, 546 U.S. 418, 424 (2006) (describing the genesis of RFRA as a response to *Smith*).

When it enacted RFRA, Congress explicitly stated that it was restoring the stringent protection accorded to religious freedom under the compelling interest test utilized in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) but overturned in *Smith*. 42 U.S.C. §2000bb(b). In particular, Congress found that the *Sherbert* and *Yoder* tests struck the proper balance between the free exercise of religion enshrined "as an unalienable right" in the First Amendment and "competing prior governmental interests." 42 U.S.C. §2000bb(a). Congress specifically contemplated that there would and should be religious exceptions made to generally applicable laws. *Gonzales*, 546 U.S. at 434.

The standard Congress established in RFRA provides that government cannot substantially burden religious exercise, even if the burden results from a rule of general applicability, unless the government can "demonstrat[e] that application of the burden *to the person*–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at 424. (citing 42 U.S.C. §§2000bb-1(a)-(b)) (emphasis added). RFRA imposes a more demanding strict scrutiny review than does the First Amendment under *Smith* in that it "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'–the particular claimant whose sincere exercise of religion is being substantially burdened. *Id.* at 430-431.

The core religious beliefs affected by the Preventive Care Mandate, the crippling, multi-faceted penalties imposed upon those who fail to comply with the mandate and the Hobson's choice that the mandate imposes upon employers far exceed the threshold for a substantial burden upon religious free exercise. The number of (non-religious) exemptions to the Preventive Care Mandate demonstrates that it cannot meet the exacting compelling interest standard required under RFRA. Finally, the myriad of alternatives available to

meet the Administration's purported interests without burdening employers' free exercise rights means that the Preventive Care Mandate is not the least restrictive means of furthering the government's purported interest in "preventive care." Those factors require a finding that the Preventive Care Mandate must be stricken as an impermissible infringement of foundational free exercise rights.

A. Compelling Employers To Choose Between Their Religious Beliefs Or Crippling Governmental Sanctions Imposes A Substantial Burden On Employers' Free Exercise Rights.

Family-owned businesses such as Hobby Lobby and Conestoga Wood and nonprofit institutions such as Liberty University that have built their organizations on the same fundamental religious principles upon which the country was founded are being forced to choose between honoring those foundational beliefs and paying crippling governmental sanctions or disavowing their sincerely held religious beliefs in order to avoid ruinous penalties. Such penalizing of the exercise of religious beliefs is precisely why Congress acted quickly to enact RFRA after a perceived

diminution of protection in *Smith*, 494 U.S. at 883-890. *See* 42 U.S.C. §2000bb (discussing *Smith* as the motivating factor for RFRA).

When it enacted RFRA, Congress specifically pointed to this Court's decisions in *Sherbert* and *Yoder* as the analytical models for governmental regulations that affect religious exercise. 42 U.S.C. §2000bb(b)(1). In fact, Congress said that RFRA was enacted to "guarantee" that the tests utilized in *Sherbert* and *Yoder* were applied to free exercise challenges. *Id.* In *Sherbert*, this Court found that denying unemployment benefits to someone who was fired for refusing to work on her Sabbath (Saturday) impermissibly burdened free exercise even though the burden was indirect and involved only a governmental benefit, not a right. 374 U.S. at 404.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. See also, Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (finding, based upon *Sherbert*, an impermissible burden on free exercise when an employee was put to a choice between fidelity to religious belief or cessation of work).

This Court rejected a similar Hobson's choice that compulsory secondary education imposed upon Old Order Amish parents in *Yoder*, 406 U.S. 205, 218.

> [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion.

Id. This is "precisely the kind of objective danger to the free exercise of religion that the First Amendment" and Congress re-affirmation of First Amendment principles in RFRA was designed to prevent. *Id.*

In *Gonzales*, this Court applied RFRA to find that the government's attempted criminal prosecution of a religious sect for importation and use of *hoasca*, which contains a controlled substance, substantially burdened the sect's free exercise rights. 546 U.S. at 428. The sect's

sincerely held religious beliefs provided that *hoasca* tea was to be part of their communion service. *Id.*

The compulsory nature of the Act's insurance requirements, substantiality of the rights affected and ruinous nature of governmental sanctions imposed by the Preventive Care Mandate, taken together, create a threat to religious free exercise that exceeds the burdens found impermissible in *Sherbert*, *Yoder* and *Gonzales*.

1. The Compelled Purchase Of A Government-Defined Insurance Product That Mandates Access To Abortifacients Is An Unprecedented Over-reach Into Employers' Business Operations.

This Court's conclusion regarding the Act's individual insurance mandate, *i.e.*, that the federal government "does not have the power to order people to buy health insurance," *NFIB v. Sebelius*, 132 S.Ct. 2566, 2601 (2012) is equally applicable to the employer insurance mandate, and illustrates the extent of the burden placed upon employers' sincerely held religious beliefs. The mandate to purchase government-defined health insurance, including the Preventive Care Mandate, is an

unprecedented intrusion into employers' business operations.[5]

The government has long regulated employers' voluntary provision of employee benefits, including health insurance, but it has *never* compelled employers to purchase health insurance, let alone government-defined coverage, for their employees.[6] Employee benefit regulations such as ERISA and COBRA only apply if employers have voluntarily agreed to provide employee benefits. "In contrast to the obligatory, nationwide Social Security program, '[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.'" *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Under both ERISA[7] and COBRA,[8] employers

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[5] *See* Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and A Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037, 1042 (1996) (describing how employer-provided health insurance had not been mandated by the government).

[6] *Id.*

[7] 29 U.S.C. §§ 1001-1461 (1982).

[8] Public L. No. 99-272, § 10001 (1986), 100 Stat. 82.

retained their freedom to choose whether to offer employee health insurance benefits and whether they should discontinue benefits so that the regulations would no longer apply.

That freedom has been taken away by the Act. Employers no longer have the freedom to determine what is best for their employees and their businesses with regard to employee benefits. Instead, employers must either: (1) provide a government-defined health insurance plan that includes, *inter alia*, free abortifacients under the Preventive Care Mandate,[9] or (2) pay debilitating penalties.[10] 26 U.S.C. §4980H. Unlike ERISA and COBRA, the Act mandates that employers provide health insurance to their employees. *Id.* More importantly, under the Act, employers cannot discontinue health insurance coverage so as to avoid violating their religious beliefs or incurring debilitating penalties. *Id.*

Employers will always be subject to the mandate, either through providing the required coverage or being penalized excessively for failing to do so. *Id.* Consequently, the Act imposes a perpetual burden upon employers that can only be relieved by going out of business entirely.

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9 *See discussion at Section IA2, below.*

10 *See discussion at Section IA3, below.*

2. The Preventive Care Mandate Threatens Employers' Core Religious Beliefs.

As was true with the compulsory education law in *Yoder*, the effect of the Preventive Care Mandate on employers' practice of their religion "is not only severe, but inescapable," for the law affirmatively compels them, under threat of governmental sanction, "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. As was true for the Amish parents in *Yoder*, religion for the employers "is not simply a matter of theocratic belief," but "pervades and determines virtually their entire way of life...." *Id.* at 216.

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the

> Amish faith, both as to the parent and the child.

Id. at 218. Similarly here, forcing employers to facilitate access to "emergency contraceptives" which have abortifacient properties substantially interferes with the religious tenets which permeate their business operations, or, in Liberty University's case, its faith-based educational community. (*See Hobby Lobby* JA 126-127; *Conestoga Wood* Pet. App. 10g-11g, Appendix at 100). These tenets provide that taking an innocent human life is an intrinsic evil and sin against God for which all believers are held accountable. (*See Conestoga Wood* Pet. App. 10g). Accordingly, the employers' sincerely held religious beliefs provide that it is immoral for them to facilitate or otherwise support the taking of a human life, including the termination of a pre-born baby through abortion, which includes prevention of the implantation of a human embryo into her mother's uterus after fertilization. (*See Conestoga Wood* Pet. App. 23g). Consequently, the employers' religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices. (*Hobby Lobby* JA 127).

The Preventive Care Mandate contravenes these religious tenets by requiring that employer-based health insurance policies

must include, *inter alia*, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." 45 CFR §147.130. FDA-approved "contraception" includes so-called "emergency contraception," Levonorgestrel, also known as "Plan B" or the "morning after pill," and Ulipristal acetate, also known as "Ella" or the "week after" pill,[11] both of which often act as abortifacients by terminating the life of a pre-born child.[12] The FDA guide to "contraceptives" states that "Plan B" and "Ella" prevent "attachment (implantation) [of the embryo] to

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[11] FDA Office of Women's Health Birth Control Guide, available at http://www.fda.gov/birthcontrol (last visited January 21, 2014).

[12] American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), Comment to Docket No. FDA–2010–N–0001Advisory Committee for Reproductive Health Drugs; Notice of Meeting Ulipristal acetate tablets, (NDA) 22–474, Laboratoire HRA Pharma. (June 2, 2010), available at http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf (last visited January 21, 2014).

the womb (uterus)."[13] During hearings regarding FDA approval for Ulipristal, medical professionals presented evidence that "Ulipristal acetate is an abortifacient of the same type as mifepristone ("RU-486") and that its approval as an emergency contraceptive raises serious health and ethical issues."[14]

> There is no doubt that Ulipristal acts as an abortifacient because the drug blocks progesterone receptors at three critical areas. These blocking capabilities form the basis of its embryocidal abortifacient mechanism. That mechanism is identical to the action of RU-486 in early pregnancy.[15]

Recent scientific evidence has demonstrated that "Plan B" does not work as a "contraceptive" by preventing ovulation, "as its sole or dominant mechanism."[16] Instead, scientific studies conducted between 2001 and

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13 FDA Birth Control Guide at 16-17.

14 AAPLOG Comments.

15 *Id.*

16 Rebecca Peck, MD, and Rev. Juan R. Vélez, MD, *The Postovulatory Mechanism of Action of Plan B A Review of the Scientific Literature,* THE NATIONAL CATHOLIC BIOETHICS QUARTERLY 40 (Winter 2013).

2013 provide compelling evidence that "Plan B" acts primarily as an abortifacient.[17] As one recent study stated:

> It is possible that Plan B may delay ovulation when given before or at the beginning of the fertile period, when the chance of pregnancy is slim to none, and *therefore, it is not "needed" to prevent pregnancy.* When given after intercourse in the fertile period and before the LH peak that triggers ovulation, Plan B fails to act as a contraceptive 80-92% of the time; it acts instead as an abortifacient, eliminating all embryos likely to have been conceived. When given on the day of ovulation or later to prevent pregnancy from intercourse during the fertile period, it almost always fails to prevent established pregnancies.[18]

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17 *Id.*

18 Susan Wills, JD, LLM, *New Studies Show All Emergency Contraceptives Can Cause Early Abortion,* ON POINT, THE CHARLOTTE LOZIER INSTITUTE 8 (January 2014) www.lozierinstitute.org/emergencycontraceptives (last visited January 21, 2014) (emphasis added).

Consequently, requiring that employers provide Plan B, Ella and other abortion-inducing drugs and devices, including IUDs, at no cost to employees does nothing to advance the Administration's purported purpose of providing "contraceptives" as "preventive care" for women. Instead, it creates a mechanism in which employers are compelled to provide access to chemical abortions, which in the case of employers such as Hobby Lobby, Conestoga Wood and Liberty University, requires that they violate the very religious beliefs upon which they base their lives and organizations and participate in a gravely evil act.

In addition, requiring that employers provide no-cost coverage for drugs and devices which act primarily as abortifacients instead of contraceptives violates the Act's prohibitions against compelled payments for abortions. The Act provides that no health plan shall be required to include "abortion" as an essential health benefit. 42 U.S.C. §18023(b)(1). In addition, immediately after signing the Act, on March 24, 2010, President Obama signed an Executive Order that reiterated that "abortion coverage" would not be required under the Act.[19] President Obama said that the Act "maintains current Hyde Amendment restrictions governing abortion policy and

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[19] Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (March 24, 2010).

extends those restrictions to the newly created health insurance exchanges."[20] President Obama said that "longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions."[21] The Administration's subsequent adoption of the Preventive Care Mandate contravenes the claim that the conscience rights of employers such as Hobby Lobby, Conestoga Wood and Liberty University will be protected. In fact, the Preventive Care Mandate impermissibly burdens religious exercise in violation of RFRA. *Thomas*, 450 U.S. at 717-18.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his

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20 *Id.*

21 *Id.*

> beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. Here, the burden involves much more than merely being denied a government benefit. It is an imposition of punishment, as is apparent in the multiple levels of penalties imposed upon employers like Hobby Lobby, Conestoga Wood and Liberty University which cannot comply with the Preventive Care Mandate and compromise the sincerely held religious beliefs that permeate their very existence.

3. The Multiple Levels Of Penalties And Sanctions Create An Unconscionable Burden For Employers.

Employers such as Hobby Lobby, Conestoga Wood and Liberty University which cannot compromise their sincerely held religious beliefs by facilitating chemical abortions face punitive penalties that will quickly jeopardize their continued existence. The Act imposes two levels of penalties upon employers, one for employers that do not offer "minimum essential coverage"–which the Administration has determined must include access to chemical abortions–and one for employers that offer coverage that the

Administration determines does not meet "affordability" standards. 26 U.S.C. §4980H(a),(b). In addition, the Act's requirements were incorporated into ERISA, which imposes other punitive sanctions upon employers who refuse to compromise their religious beliefs by facilitating access to chemical abortions.

The penalties directly imposed in the Act not only punish employers that fail to provide insurance, but also employers that provide coverage that the government deems is not "affordable." 26 U.S.C. §4980H. An employer that fails to provide health insurance for its employees will be penalized at the rate of $2,000 per year per "full-time" employee (less 30). 26 U.S.C. §4980H(c)(4). "Full-time" is defined as 30 hours per week. *Id.* In addition, employees working fewer than 30 hours per week are aggregated and their time divided by 120 to create "full-time equivalent employees" for each month. 26 U.S.C. §4980H(c)(2)(E). This penalty will apply to an employer that provides health insurance, if it does not comply with the "minimum essential coverage" requirements, which include the Preventive Care Mandate. 26 U.S.C. §4980H(a),(b). Consequently if an employer such as Liberty University, Hobby Lobby or Conestoga Wood continued to provide health insurance but refused to provide coverage for abortifacients, in keeping with its religious beliefs, it would still face the $2,000

per employee per year penalty. Hobby Lobby would be facing an annual penalty of $26 million based upon its 13,000 full-time employees. (*Hobby Lobby* JA 126). Conestoga Wood would face an annual penalty of $1.9 million based upon its 950 employees. (*Conestoga Wood* Pet. App. 11g, 21g). In each case, the employers would essentially be paying ransom in order to maintain their freedom to operate their businesses or organizations in accordance with their sincerely held religious beliefs.

Furthermore, even employers that provide health insurance that meets the "minimum essential coverage requirements" will still face penalties of $3,000 per applicable employer per year if the Administration determines the health care plan is "unaffordable." 26 U.S.C. §4980H(b). A plan is deemed unaffordable if the employee's portion of the premium is more than 9.5 percent of the employee's household income and the employee seeks a tax credit or subsidy. *Id.*

The Act's requirements for employer-provided health insurance were incorporated into ERISA, which subjects employers to further penalties and civil liability. 29 U.S.C. §1185d. 29 U.S.C. §1132; 26 U.S.C. §4980D. ERISA penalties start at $100 per *day* and increase to $2,500 per *day* if an employer has been notified of a "deficiency," *e.g.*, failing to provide no-cost coverage for abortifacients, and

fails to correct it. 29 U.S.C. §1132. If the deficiency in coverage is found to be more than "de minimis," then the penalty can increase from $2,500 to $15,000 *per day*. *Id.* An employer's on-going refusal to provide free contraceptives and abortion drugs and devices which conflict with its sincerely held religious beliefs would fall in this category. Consequently, employers such as Hobby Lobby, Conestoga Wood and Liberty University would be subject to fines of $15,000 *per day* if they refuse to violate their sincerely held religious beliefs. HHS, the Department of Labor and employees can also bring civil suits against employers for violation of insurance requirements under ERISA, subjecting employers who refuse to violate their religious beliefs to further liability. 29 U.S.C. §1132.

Like a bandit on the highway demanding "your money or your life," the Administration is placing a gun to the head of employers that operate businesses and organizations upon religious principles. These employers are being told to choose between their sincerely held religious beliefs and the continued viability of their organizations. Instead of protecting the religious free exercise rights as directed by Congress, the Administration is sacrificing those rights under the guise of offering "preventive care" for women. This trampling of the fundamental free exercise rights upon

which this country was founded should not be permitted.

B. The Administration Utterly Fails To Satisfy Its Burden To Prove That The Preventive Care Mandate Is Justified By A Compelling State Interest

The Administration claims that the Preventive Care Mandate furthers compelling state interests in public health and "assuring that women have equal access to recommended health-care services." (Brief for Petitioners, *Sebelius v. Hobby Lobby*, Case No. 13-354, at pp. 46-49). Close examination of the requirements of the mandate and penalties for non-compliance tell a different story. "It would seem that HHS has a greater interest in punishing religiously based opposition to contraception and abortion than it has in increasing access to contraceptives. And that punitive interest is not legitimate, much less compelling, under RFRA."[22]

Public health studies and the Administration's own statements belie the claim that there is a compelling interest in

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[22] Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2188 (2012).

increasing women's access to contraceptives. A Guttmacher Institute "fact sheet" on contraceptive use in the United States reports that "[n]ine in 10 employer-based insurance plans cover a full range of prescription contraceptives."[23,24] In addition, HHS Secretary Kathleen Sebelius has stated that even when employers do not offer coverage of contraceptive services to their employees, "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[25] Combined with the "the countless pharmacies and doctors who dispense contraceptives," "it

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[23] *Id.* at 2186-2187; Guttmacher Institute, *Fact Sheet Contraceptive Use in the United States* (August 2013), available at http://www.guttmacher.org/pubs/fb_contr_use.html#23 (last visited January 22, 2014).

[24] Hobby Lobby, Conestoga Wood and Liberty University all provide coverage for contraceptives that do not act as abortifacients, thus further undercutting the idea that there is a problem with access to contraceptives. (*See Hobby Lobby* JA 140; *Conestoga Wood* Appx. 100).

[25] *Id.* at 2187, citing *Statement By Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012) available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited January 22, 2014).

cannot be seriously maintained that there is a general problem of lack of access to contraceptives."[26]

> In this context, it is difficult to see how the government has a "compelling" interest in marginally increasing access to contraceptives by requiring employers to provide coverage of them in their health-insurance plans. [27]

The–at best–marginal increase in access to contraceptives that might be realized from the Preventive Care Mandate does not constitute a compelling interest that can justify the substantial burden upon employers' religious free exercise rights. As this Court said in the context of a law restricting free speech, "Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 1, 16 n.9 (2011). Similarly here, even if access to contraceptives could be increased through a governmental mandate, the Administration does not have a compelling interest in effecting a marginal

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26 *Id.*

27 *Id.*

increase in coverage at the expense of employers' religious liberty.

In addition, any marginal increase in access to contraceptives cannot be compelling in light of the fact that many employers have, for purely secular reasons, been exempted from the Preventive Care Mandate. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Congress created exemptions for small employers and grandfathered health plans. 26 U.S.C. § 4980H(c)(2) (exempting from health care provision requirement employers of less than 50 full-time employees); 42 U.S.C. §18011 (grandfathering of existing health care plans).

At the time the Act became effective, HHS projected that employer-based health insurance covering about 98 million Americans would be exempt from the Preventive Care Mandate and other mandates in the Act under the grandfathering provision.[28] Excluding these 98 million people, as well as the millions who work for employers of less than 50 people from

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[28] Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 75 Fed. Reg. 41,732 (July 19, 2010).

the Preventive Care Mandate undercuts the Administration's claim that it has a compelling interest in mandating that employer-based health insurance must provide free abortifacients even over the objections of those with sincerely held religious beliefs against providing such coverage. *See Lukumi Babalu Aye*, 508 U.S. at 547.

Likewise, the Administration cannot meet its burden of demonstrating that application to these objecting employers furthers its compelling state interest. As this Court said in *Gonzales*, RFRA's heightened compelling interest standard requires that the Administration demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person," *i.e.*, the particular claimant whose sincere exercise of religion is being substantially burdened. 546 U.S. at 430-431. The Administration cannot exempt millions of Americans who work for small employers and whose employers' plans are "grandfathered" from the Preventive Care Mandate and then argue that it is necessary that employers whose religious beliefs proscribe facilitating access to abortifacients be subject to it.

Furthermore, the Administration's creation of a "religious employer" exemption and non-profit employer "accommodation" itself demonstrates that there is no compelling interest in excluding employers with religious

objections to abortifacients from the mandate. 76 Fed.Reg. 46,626 (August 3, 2011); 78 Fed. Reg. 39,873-39,878 (July 2, 2013). As was true with the exemption for sacramental use of illegal drugs for Native American religious adherents and the government's claim that it could not exempt similar use by the O Centro Espirita Church, the Administration's creation of a partial exemption for certain religious employers and accommodation for non-profits belies any claim that there is a compelling interest in denying exemptions for other employers with sincerely held religious beliefs proscribing the facilitation of access to abortifacients, such as Hobby Lobby, Conestoga Wood and Liberty University. *See Gonzales,* 546 U.S. at 436-37.

As the Colorado District Court said in granting a preliminary injunction against the Preventive Care Mandate, "[t]he government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012).

C. Compelling Employers To Violate Their Religious Beliefs And Provide Free Abortifacients Is Not The Least Restrictive Means Of Meeting The Administration's Stated Interest.

The Administration's piecemeal "religious employer" exemption to the Preventive Care Mandate also demonstrates that the mandate is not the least restrictive means for accomplishing a compelling interest. *Sherbert*, 374 U.S. at 407. To show that the mandate is the "least restrictive means" available, the Administration must "demonstrate that no alternative forms of regulation would [serve its interest] without infringing First Amendment rights." *Id.* If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

That is precisely what the Administration has done in enacting the Preventive Care Mandate. The very act of drafting a narrow "religious employer" exemption and then an additional "accommodation" demonstrates that there was and is a less drastic way to provide the kind of

"preventive coverage" the Administration claims is necessary. Even if "preventive care" were a compelling government interest (which it is not), there are a number of alternative means for providing the coverage without trampling upon employers' free exercise rights. The government could increase access to contraceptives by directly compensating the providers for the services.[29]

> In other words, an individual would receive the services from a provider for free, and the government would compensate the provider. This means would clearly be less restrictive of the religious liberty of the objecting employer, as the employer would not be required to sponsor an insurance plan that subsidizes services that he has religious objections to. [30]

The Administration has numerous other means of increasing access to "contraceptives" that are less restrictive of religious liberty than is the Preventive Care Mandate, including directly providing the products, mandating that providers make the products available, and tax credits, deductions or other financial support

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[29] *See* Whelan, *Contraception Mandate vs. RFRA*, at 2186.

[30] *Id.*

for contraceptive purchasers.[31] Notably, the government already provides "contraceptive" coverage to more than nine million women,[32] demonstrating that this alternative is reasonable and viable. The Administration received substantial evidence, including more than 400,000 comments, that the Preventive Care Mandate substantially burdens religious free exercise and the "religious employer" exemption and non-profit employer "accommodation" did not address the burden.[33]

Nevertheless, and in spite of the myriad of alternatives available to meet the purported need, the Administration chose to retain the mandate, including the compelled purchase of abortion-inducing drugs and devices, without further exemptions. As one commentator said, this suggests that, rather than trying to further

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[31] *Id.*

[32] Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, And The HHS Mandate: Why The Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1368 (2013) (citing *Facts on Publicly Funded Contraceptive Services in the United States*, Guttmacher Institute (May 2012)).

[33] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,871 (July 2, 2013). *See* discussion of the exemption and "accommodation" *infra*.

a compelling interest, the Administration is taking sides against religious adherents.[34]

> Instead of focusing on the wellbeing of all insureds, the mandate arguably adopts a position that prefers the particular interests of a subset of the public–women who want contraceptive and sterilization coverage–over the interests of others–men and women who have religious and conscientious objections to all or part of such coverage.[35]

Taking sides against people of faith is antithetical both to the express prohibitions of the First Amendment and to Congress' expressed intent to guarantee that religious free exercise rights are rigorously protected. 42 U.S.C. §2000bb. The Administration disregarded Congress' clear direction when it enacted the Preventive Care Mandate without appropriate recognition of the pre-eminent rights of employers such as Hobby Lobby, Conestoga Wood and Liberty University to

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[34] Edward A. Morse, *Lifting The Fog: Navigating Penalties In The Affordable Care Act*, 46 CREIGHTON L. REV. 207, 246-247 (2013).

[35] *Id.*

operate their organizations in keeping with their sincerely held religious beliefs.

II. THE ADMINISTRATION IS ATTEMPTING TO REPEAL RFRA BY EXECUTIVE FIAT.

By directing that employers provide free abortifacient drugs and devices to their employees in perpetuity or pay crippling multi-million dollar fines, the Administration has circumvented Congress and attempted to effectively repeal RFRA by executive decree. The text of the Act, its legislative history and Congress' prior rejection of similar expansive contraception mandates demonstrate that the Preventive Care Mandate exceeds the authority that Congress granted to the Administration to implement the Act.

Congress did not alter the principles enunciated in RFRA when it adopted the Act in 2010. To the contrary, Congress explicitly included protections for religious conscience in the Act. For example, it included two "religious" exemptions to the requirement that all individuals acquire and maintain minimum essential health insurance coverage. 26 U.S.C. §5000A(d)(2).[36] In addition, *inter alia*, Congress

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[36] Amici do not concede that the "religious" exemptions in 26 U.S.C. §5000A are adequate, but are citing the exemptions as examples of

provided protection of an "elder's right to practice his or her religion through reliance on prayer alone for healing." 42 U.S.C. §1397j-1(b). Consequently, Congress affirmed that religious free exercise rights must still be respected in the new comprehensive governmental health insurance regulations. RFRA's protections can only be repealed or superseded through explicit language. 42 U.S.C. §2000bb-3(b). Congress provided no such explicit language in the Act, so it is beyond dispute that the Act and its implementing regulations must comport with RFRA.

When it enacted the Act in 2010, Congress left the details of what services would be part of required "minimum essential coverage" to the discretion of HHS. 42 U.S.C. §18022(b). The Act provided that "women's preventive care" should be included in the minimum coverage requirement, but did not delineate what products or services constituted that preventive care, and in particular, did not provide that contraceptives or abortifacients should be included. *Id.* Notably, Congress twice had an opportunity to adopt statutorily what the Administration has done with the Preventive Care Mandate, *i.e.*, mandate that insurance policies provide free "contraceptives"

Congress' intent to continue to provide religious exemptions in keeping with RFRA.

with no exemptions for religious objectors.[37] On both occasions, however, the legislation was rejected, indicating that Congress did not view mandating free "contraceptive" care regardless of religious objections as a legislative priority. Congress again sent that message when it did not specify that free contraceptives and abortifacients be included in women's "preventive care" in the Act.

Consequently, when Congress delegated to the Administration the task of promulgating regulations to define "minimum essential coverage," including "women's preventive care," it did so in the context of having previously rejected mandated contraception coverage, omitting contraception coverage from the general definition of "minimum essential coverage" and continuing its commitment to protecting religious free exercise under RFRA. The Administration was obligated to exercise its discretion within those parameters. *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

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[37] Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Cong. §§ 3-4 (1st Sess. 2007), S. 3068, 110th Cong. (2d Sess. 2008); Putting Prevention First Act of 2004, H.R. 4192, 108th Cong. §§ 301-04 (2d Sess. 2004), S. 2336, 108th Cong. (2d Sess. 2004).

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Id. Contravening this limitation on its authority, the Administration has set about making new law and creating regulations wholly out of harmony with RFRA.

Within weeks after the Act was signed into law, the Administration issued regulations providing that "women's preventive care" must include, at no cost, the "full range" of FDA-approved "contraceptives," including the abortifacients the FDA labels as "emergency contraception" and IUDs which have also been shown to induce abortions. 75 Fed. Reg. 41,728 (July 19, 2010). Even though Congress had retained RFRA protections in the Act, the Administration did not provide for any religious conscience exemptions from the mandated coverage for "contraceptives" and abortifacients. *Id.* Only after receiving

comments from those whose religious beliefs proscribe providing or facilitating access to abortifacients did the Administration agree to *consider* exemptions or accommodation for such beliefs. 76 Fed. Reg. 46, 623 (August 3, 2011).[38]

In response to the evidence that the regulations violated religious free exercise, the Administration merely said that it would be "appropriate" to "take into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate." *Id.* at 46,623. The Administration further limited its consideration of free exercise rights by specifying that it would only consider providing "for a religious accommodation that respects the unique relationship between a *house of worship* and its employees in ministerial positions." *Id.* (emphasis added). Therefore, the Administration acquiesced only

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[38] *See e.g.*, Letter from General Counsel, U.S. Conference of Catholic Bishops to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (August 31, 2011), stating that the proposal violates the First Amendment and RFRA, available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf (last visited on January 23, 2014).

to consider exempting houses of worship and their ministers from the Preventive Care Mandate. *Id.* at 46,626. The Administration's response contravened Congress' direction that RFRA's protections be applied "in *all cases* where free exercise of religion is substantially burdened," 42 U.S.C. §2000bb(b) (emphasis added).

Faith-based organizations informed the Administration that the initial response failed to adequately protect the rights guaranteed under the First Amendment and RFRA.[39] However, the Administration insisted that its "approach is consistent with the First

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[39] See e.g., Letter from Richard Land, President, The Ethics and Religious Liberty Commission of the Southern Baptist Convention to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (September 30, 2011), available at http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0023-77408 (last visited January 23, 2014). Letter from Collegium Aesculapium Foundation, Inc. to Centers for Medicare & Medicaid Services Department of Health and Human Services (September 28, 2011), available at http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0023-60660 (last visited January 23, 2014).

Amendment and Religious Freedom Restoration Act."[40]

> The Supreme Court has held that the First Amendment right to free exercise of religion is not violated by a law that is not specifically targeted at religiously motivated conduct and that applies equally to conduct without regard to whether it is religiously motivated–a so-called neutral law of general applicability. The contraceptive coverage requirement is generally applicable and designed to serve the compelling public health and gender equity goals described above, and is in no way specially targeted at religion or religious practices. Likewise, this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the

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[40] *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8,725, 8,729 (February 15, 2012).

> least restrictive means to further a compelling government interest.[41]

Although the Administration represented that its approach was consistent with the Constitution and federal law, Secretary Sebelius testified that HHS did not consult the Department of Justice on the matter of the constitutionality of the rule before making that representation.[42]

After representing that its approach complied with the Constitution and RFRA, the Administration announced that it would postpone implementation of the Preventive Care Mandate through a narrowly defined one-year "temporary enforcement safe harbor" for non-profit organizations that had religious objections to contraceptives and abortifacients but did not fall within the narrow "religious employer," *i.e.*, houses of worship, exemption. 77 Fed. Reg. 8,728. The Administration

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41 *Id.*

42 See The Fiscal Year 2013: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 112th Cong. (2012) (statement of Kathleen Sebelius, Secretary, Department of Health and Human Services), available at http://energycommerce.house.gov/hearing/fy-2013-hhs-budgetvideo (comments at 1:37 in the video testimony).

represented that it would use the intervening year to develop alternative accommodations for theses objecting organizations. *Id.* at 8,728. However, at the same time, President Obama emphasized that free contraceptives and abortifacients would have to be provided to women, regardless of where they work, signaling that the Administration was not going to exempt employers such as Hobby Lobby, Conestoga Wood and Liberty University from having to facilitate access to the abortifacients that violate their sincerely held religious beliefs.[43]

On February 1, 2013, the Administration issued a Notice of Proposed Rulemaking ("NPRM") to address the accommodation referenced in the February 15, 2012 regulation. 78 Fed. Reg. 8,456 (February 6, 2013). The NPRM proposed to modify the "religious employer" exemption to make an exemption available to "a non-profit church, integrated auxiliary, convention or association of churches or a religious order." *Id.* at 8,474. The Administration still insisted that there would be no exemptions for for-profit employers such as Hobby Lobby and Conestoga Wood or non-

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[43] Remarks of the President on Preventive Care, February 10, 2012, available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited January 23, 2014).

profit employers such as Liberty University which operate their organizations in accordance with sincerely held religious beliefs that proscribe facilitating access to abortifacient drugs and devices. *Id.*

Under the proposal, non-profit organizations would not have to *directly* pay for the objectionable products but would still be facilitating access to abortifacients. *Id.* at 8,475. The Administration proposed that organizations that utilize insurance carriers would notify the carrier that it objects to paying for certain contraceptive or abortifacient coverage and the carrier would then provide free contraceptives or abortifacients through a separate insurance policy. *Id.* According to the proposal, the issuer of the separate policy could not directly or indirectly charge a fee or premium to the non-profit organization for the objectionable contraceptive or abortifacient services. *Id.* The NPRM proposed that the cost of the separate contraceptive/abortifacient policy would be paid for through reductions in the fees the insurer would pay to government insurance exchanges. *Id.*

The Administration did not offer a proposal for self-insured organizations, such as Liberty University, regarding how a separate contraceptive/abortifacient insurance policy would be funded without charging the objecting organization. *Id.* at 8,474. The Administration said that the person receiving the abortifacient

drugs and devices was not to be charged, and the self-insured employer was not to be charged without indicating how the cost would be covered. *Id.* at 8,463-8,464. The Administration admitted, however, that self-insured organizations are the only funding source for insurance coverage so that there is no way for those organizations to avoid paying for abortifacients. *Id.* at 8,463-8,464.

After the NPRM was issued, the United States Conference of Catholic Bishops re-iterated that the gaps in the funding mechanism meant that objecting employers would have to be involved in paying for or facilitating for payment of contraceptives/abortifacients in violation of their sincerely held religious beliefs.

> [I]t appears that the government would require all employees in our "accommodated" ministries to have the illicit coverage—they may not opt out, nor even opt out for their children—under a separate policy. In part because of gaps in the proposed regulations, it is still unclear how directly these separate policies would be funded by objecting ministries, and what precise role those ministries would have in arranging for these separate policies. Thus, there

> remains the possibility that ministries may yet be forced to fund and facilitate such morally illicit activities.[44]

The Bishops' comments were among more than 400,000 submitted in response to the NPRM. 78 Fed. Reg. 39,871 (July 2, 2013).

Despite statements from affected employers that the narrow religious employer exemption does not address the substantial burden placed upon employers' free exercise rights, the Administration refused to expand the exemption to conform to Congress' direction that protection is to be offered in all cases where free exercise of religion is substantially burdened. The final regulations announced in July 2013 retain the extremely narrow definition of religious employer to include only houses of worship and their integrated auxiliaries. 78 Fed. Reg. at 39,874. The Administration expressly acknowledged its preference for expanding free access to

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[44] Statement of Cardinal Timothy Dolan, *United States Conference of Catholic Bishops, HHS Proposal Falls Short In Meeting Church Concerns; Bishops Look Forward To Addressing Issues With Administration* (February 7, 2013), available at http://www.usccb.org/news/2013/13-037.cfm (last visited January 23, 2014).

contraceptives and abortifacients over respecting the sincerely held religious beliefs of employers. *Id.*

> The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement. Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

Id. In other words, according to the Administration, the critical consideration is not the religious beliefs of the employers which Congress has explicitly protected, but whether employees want free contraceptives and abortifacients. *Id.*

In keeping with that philosophy, the Administration continued to provide only what it termed an "accommodation" for non-profit organizations that object to providing or facilitating access to contraceptives and/or abortifacients. *Id.* at 39,874-39,878. Under the "accommodation," the non-profit organizations notify third-party insurers that they object to providing the contraceptive and/or abortifacient coverage, and the third-party insurer then pays for the abortifacients/contraceptives provided to employees. *Id.* The Administration states that insurers are not to directly or indirectly charge the objecting employers for the abortifacients and contraceptives that are provided at no cost to the employees. *Id.* The Administration did not explain how the costs of the contraceptives and abortifacients would be covered. *Id.* Instead, the Administration insisted that providing the contraceptives and abortifacients would be "cost neutral" because the insurer would realize savings from not having to pay for pregnancies and related claims. *Id.* The Administration also suggested that insurers might spread the cost over the insurers' risk pool. *Id.*

As for self-insured objecting non-profit organizations, the Administration said that third part administrators utilized by those organizations would serve the same role as do third party insurers. *Id.* at 39,789-39,880. Because no comments were submitted by self-

insured organizations without third party administrators, the Administration assumed that no such organizations exist and made no provision for them. *Id.* at 39,880-39,881. The Administration said that if such organizations exist and prove their existence to the Administration, then the Administration will not enforce the Preventive Care Mandate against the organization until it devises a plan to ensure that free contraceptives and abortifacients can be provided. *Id.* The Administration continued to refuse to extend either an exemption or accommodation to for-profit organizations, such as Hobby Lobby and Conestoga Wood. *Id.* at 39,875.

The Administration has acted contrary to Congress' clear direction that religious free exercise rights must continue to be respected in the Act. Instead of providing the religious conscience exemptions required under RFRA and included elsewhere in the Act, the Administration has gone to great lengths to ensure that a perceived right to access to free abortifacients is not hampered by employers' sincerely held religious beliefs. In turning the purposes of RFRA on its head, the Administration has usurped its role as regulator. Instead of implementing the Act in accordance with Congress' directions, the Administration has endeavored to create new law, effectively repeal RFRA and establish a new "right" to receive free contraceptives and

abortifacients. The Administration has failed to "carry into effect the will of Congress as expressed by the statute" by enacting the Preventive Care Mandate. *Manhattan General Equip.*, 297 U.S. at 134. Consequently, the Preventive Care Mandate is "a nullity" and should be overturned. *Id.*

CONCLUSION

The Preventive Care Mandate violates RFRA by imposing upon employers a perpetual mandate to supply free abortifacient drugs and devices or pay multi-million penalties that will drive them out of business. The Administration has exceeded its authority in enacting regulations that contradict Congress' clear direction and purport to create new law.

For these reasons, this Court should invalidate the Preventive Care Mandate.

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Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org